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(9)

No. 06-5754

IN THE

Supreme Court of the United States

VICTOR A. RITA,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR AMICI CURIAE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND VETERANS FOR AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fourth Circuit's standard of appellate review has preserved de facto mandatory Guidelines, contrary to this Court's ruling in *United States* v. *Booker*, 543 U.S. 220 (2005).

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BRIEF FOR AMICI CURIAE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND VETERANS FOR AMERICA IN SUPPORT OF PETITIONER

INTEREST OF AMICI[1]

The National Veterans Legal Services Program is an independent, nonprofit, veterans' service organization dedicated to ensuring that the United States government honors its commitment to our veterans by providing them with the federal benefits they have earned through their service to our country. Veterans for America is a nonprofit advocacy

[1] This brief was prepared in its entirety by amici curiae and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than amici curiae and their counsel. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

and humanitarian organization that unites the newest generation of military veterans with those from past wars to advance policies favorable to veterans and elevate public discourse regarding the causes, the conduct, and, particularly, the consequences of war.

Amici submit this brief to express their common concern about the particularly harsh consequences of the decision below for Amici's core constituencies—United States military veterans. The Sentencing Commission turned its back on veterans, both by constraining the ability of sentencing judges to account for physical and mental infirmities that disproportionately afflict veterans and by providing that a record of honorable military service is typically irrelevant at sentencing. The men and women who have served our country honorably, especially in combat theaters, often pay tremendous physical and emotional costs for doing so. The toll for frequent deployments to battle zones such as Vietnam, Iraq, and Afghanistan all too often comes due in a veteran's unfortunate involvement with the criminal justice system. The Court should free sentencing judges to consider the service of veterans such as Victor Rita to this country, as well as the physical and mental consequences of that service. That cannot happen so long as Guidelines sentences are considered "presumptively reasonable" on appeal.

INTRODUCTION AND SUMMARY

As petitioner explains, the Sixth Amendment principles recognized in *United States* v. *Booker*, 543 U.S. 220 (2005), prohibit the federal courts from treating harsh criminal sentences as presumptively reasonable simply because they fall within the levels that would be permitted by the Sentencing Guidelines if they were still mandatory. In this brief, we address the special significance of that issue to our Nation's military veterans, such as petitioner Victor Rita.

The Guidelines disserve veterans in two basic respects. *First*, they unduly constrain the discretion of sentencing courts to reduce sentences to account for mental and physical problems that, although they afflict a great variety of

Americans, disproportionately afflict veterans. For example, even though Congress has directed sentencing courts to consider whether prison time would deny a defendant "needed ... medical care," 18 U.S.C. § 3553(a), the Guidelines restrict a defendant's ability to argue that the court should spare him from prison time on the ground that a prison environment would exacerbate his condition and deprive him of the medical treatment he needs. Similarly, military experiences can cause a range of long-term mental illnesses, such as post-traumatic stress disorder and chronic depression, that may be relevant to a defendant's culpability for his conduct. But the Guidelines constrain the circumstances in which a defendant is free to argue that mental illness diminished his culpability and thus warrants leniency in sentencing.

These constraints on a court's sentencing discretion are inappropriate in any context, whether the defendant is a veteran or not. But their disproportionate impact on combat veterans is particularly unjustified, given that many of them sacrificed their mental health in the service of our country.

Second, the Guidelines disserve veterans by discouraging a sentencing judge from taking into account, among the mix of factors relevant to each sentencing decision, the moral weight of a veteran's contributions to society through his or her military service. Shortly after the Sentencing Guidelines were introduced, a federal court granted a downward departure to a highly decorated Marine Corps veteran convicted of mail theft. *United States* v. *Pipich*, 688 F. Supp. 191 (D. Md. 1988). As that court explained, "[a]n exemplary military record, such as that possessed by this defendant, demonstrates that the person has displayed attributes of courage, loyalty, and personal sacrifice" and, depending on the circumstances, should qualify as "a mitigating factor that warrants departure from" the Guidelines. *Id.* at 193.

The Sentencing Commission responded to that decision (and the decisions that cited it, all with approval) by issuing a Policy Statement that "[m]ilitary ... service," among other

good works, is "not ordinarily relevant in determining whether a departure is warranted." USSG § 5H1.11. The Commission offered no explanation for stripping the district courts of discretion to grant a defendant some leniency because of particularly honorable contributions to our national welfare.

In sum, Guidelines sentences, at least as applied to military veterans, are not "presumptively reasonable," and they should not be treated as such either by sentencing judges or by appellate courts on review.

ARGUMENT

I. THE GUIDELINES UNLAWFULLY RESTRICT THE ROLE THAT MENTAL AND PHYSICAL INFIRMITIES MAY PLAY AT SENTENCING AND THUS SYSTEMATICALLY DISADVANTAGE VETERANS

The Guidelines generally forbid consideration of mental illness as a reason for a downward departure, USSG § 5H1.3, unless that mental illness is "significant[]" and itself "contributed substantially to the commission of the offense," USSG § 5K2.13.[2] This formulation produces two unfortunate results. First, contrary to Section 3553(a)(2)(D), the Guidelines discourage courts from taking individuals' psychiatric needs into account for incarceration purposes. Second, they unduly constrain judges from taking mental illness into account in assessing culpability.

A. The Guidelines Violate Section 3553(a)(2)(D) By Constraining Judges From Considering Defendants' Mental Health Needs At Sentencing

Section 3553(a) requires the sentencing court to "consider ... the need for the sentence imposed ... to provide the defendant with needed ... medical care[] or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). That statutory imperative means that,

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[2] Even where those conditions are met, the Guidelines forbid courts from departing downwards where the mental impairment was intoxicant-induced or where the defendant must be incarcerated to "protect the public." *Id.* We do not address these additional limitations in this brief.

where possible, sentences should accommodate the needs of defendants whose medical conditions cannot be treated as effectively in prison as elsewhere. *See United States* v. *Duhon*, 440 F.3d 711, 715 (5th Cir.), *pet. for cert. filed* (U.S. May 18, 2006) (No. 05-1114) (district court's conclusion that defendant's "psychiatric rehabilitation would be best served with a probationary sentence that would allow him to continue treatment with his current psychologist . . . was consistent with subsection (2)(D)'s mandate to consider the need to provide the defendant with medical care in the most effective manner"); *United States* v. *Pallowick*, 364 F. Supp. 2d 923, 930 (E.D. Wis. 2005) (evaluating mental illness directly under Section 3553(a)(2)(D) and, in sentencing defendant to below-Guidelines period of incarceration, "conclud[ing] that sending defendant to prison for a lengthy period of time would not aid in his rehabilitation and might actually hinder the progress he made in counseling").

The Sentencing Guidelines thwart this statutory objective. They provide that while "[m]ental and emotional conditions" may be taken into account in crafting add-on conditions for probation or supervised release, they "are not ordinarily relevant in determining whether a departure is warranted." USSG § 5H1.3. Notably, the Guidelines' mental illness formulation lacks even the carve-out for "extraordinary . . . impairment" that courts may consider with respect to physical infirmities. *See* USSG § 5H1.4 (departure on account of physical condition may be reasonable, "e.g., in the case of a seriously infirm defendant, [where] home detention may be as efficient as, and less costly than, imprisonment").[3] Because the Guidelines thus discourage consideration of

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[3] Veterans—especially combat veterans like petitioner Rita—obviously are more likely to suffer from physical impairments than non-veterans. And they are dramatically more likely to suffer from the types of serious impairments, such as missing limbs, that could render them particularly vulnerable in a prison environment. There is no principled reason to limit downward departures for physical infirmities to those that are "extraordinary," and generally only to cases where alternative punishment would be less costly than imprisonment. *See* USSG § 5H1.4.

whether mentally ill defendants will receive continued medical treatment "in the most effective manner," they contravene Section 3553(a).

Indeed, Department of Justice reports make clear that federal inmates are unlikely to receive proper psychiatric care. According to the Bureau of Justice Statistics (BJS), only 24 percent of federal prison inmates with mental health problems receive any sort of mental health treatment at any point during their incarceration. *See* U.S. DOJ, BJS, *Mental Health Problems of Prison and Jail Inmates*, 9, Table 14 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf. Moreover, as recently as 1997 (the most current data evaluated by the BJS in this respect), fewer than 60 percent of the most seriously mentally ill federal inmates had "[r]eceived any mental health service" since admission. *See* U.S. DOJ, BJS, *Mental Health and Treatment of Inmates and Probationers*, 9, Table 14 (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtip.pdf.

Imprisoned military veterans are disproportionately likely to suffer from mental illness—and thus to be harmed by the Guidelines' disregard of Section 3553(a)(2)(D). According to the most recent edition of "Veterans in Prison or Jail," a BJS "Special Report," 13.2 percent of veterans in federal prison in 1997 were among the most seriously mentally ill (as compared to 6.4 percent of nonveteran federal inmates). *See* U.S. DOJ, BJS, *Veterans in Prison or Jail*, 12, Table 15 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/vpj.pdf (citing *Mental Health and Treatment of Inmates and Probationers*). The report also shows that state-prisoner veterans who saw combat were 21 percent more likely than those who did not to be mentally ill, *id.* at 12, and honorably discharged veterans were 16 percent more likely than other veterans in state prison to be mentally ill, *id.* at 13.[4]

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[4] The report does not provide equivalent breakdowns among veterans in federal prisons.

The Bureau of Prisons' disregard of mental health needs stands in stark contrast to the extensive and targeted care that the Veterans Health Administration makes available to veterans outside of prison. *See generally* Health Care—Veterans Health Administration, Clinical Programs & Initiatives, http://www1.va.gov/health/clinical.html. Veterans, especially combat veterans, tend to suffer disproportionately from a well-defined set of diseases such as post-traumatic stress disorder ("PTSD") and severe depression. *See* Hankin et al., *Mental Disorders and Mental Health Treatment Among U.S. Department of Veterans Affairs Outpatients: The Veterans Health Study*, Am. J. Psychiatry 156:1924, 1925, 1929 (Dec. 1999), *available at* http://ajp.psychiatryonline.org/cgi/reprint/156/12/1924 ("depression [and] posttraumatic stress disorder . . . are debilitating conditions and are prevalent among VA patients[,]" and "screening rates of depression and PTSD are higher than rates found among comparably aged patients in primary care in the private sect[or]" (citations omitted)); Fontana et al., *The Long Journey Home XIV: Treatment of Posttraumatic Stress Disorder in the Department of Veterans Affairs: Fiscal Year 2005 Service Delivery and Performance* (Mar. 2006), at 1, *available at* http://www.nepec.org/PTSD/ptsLJHaE.pdf ("For many thousands of veterans, PTSD is a chronic disorder resulting directly from their military service that causes substantial psychological suffering and social disability").

The Veteran's Health Administration has more experience treating these diseases—and has had more success at it—than any other provider. *Long Journey Home XIV* at 1 ("The national network of specialized PTSD programs that has been established by VA is unique in the world[,]" and "[s]tudies have shown that veterans are very well pleased with the services received, significantly more so than they are with services from nonspecialized psychiatry programs" (citations omitted)). Successful treatment of PTSD and depression correlate to reduced violent criminal activity. *Cf.* Zeller, *PTSD, Substance Abuse, and Violence Among Combat Veterans* (July 2004), at 3, *available at*

http://wwwlib.umi.com/dissertations/preview_page/3150358/20#top ("findings suggest that veterans who report more reexperiencing symptoms . . . exhibit more severe levels of . . . violence when compared to non-PTSD diagnosed veterans" (citations omitted)). The earlier treatment is initiated, however, the more likely it is to be successful. *See* James, *A Transitional Day Treatment Program for Soldiers with Severe Post Traumatic Stress Disorder* 11 (2002), *available at* http://wwwlib.umi.com/dissertations/preview_page/3057614/23#top ("One of the key components to PTSD recovery seems to be early diagnosis and intervention. . . . The earlier that soldiers with PTSD [are] identified and treated, the better [] their chances of recovery" (citations omitted)).

Imprisoning veterans who suffer from these diseases thus directly increases their risk of recidivism by cutting them off from the first-in-class treatment available at the VA.[5] And their odds of receiving *any* treatment from the Bureau of Prisons are likely worse than a coin-flip.

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[5] There is some evidence that veterans, as a class, pose a substantially lower recidivism risk than other individuals convicted of crimes. In 1993, the New York Department of Correctional Services ("NYDCS") performed a study to measure the effectiveness at reducing recidivism of two pre-release intervention programs for veterans. State of New York, Dep't of Correctional Servs., *Veterans' Program Follow-up* (July 1993), *abstract available at* http://www.ncjrs.gov/app/publications/Abstract.aspx?id=149419 (study on file at NYDCS). The study included "two comparison populations: 1) Non-Veteran Releases in the release years studied (N=68,587), and 2) Veteran Releases with no reported participation in a veterans' program (N=5,538)." *Id.* at 3. Comparing these two large control groups against each other shows that veterans who have not participated in any pre-release intervention program return to the NYDCS system at less than 80 percent of the rate at which similarly situated nonveterans return. *See id.*, Appendix 1. Similarly, the BJS's report on incarcerated veterans indicates that such veterans earn, on average, significantly more "good time" than nonveterans, *see Veterans in Prison or Jail*, 8 Table 8; 18 U.S.C. § 3624, and thus suggests that veterans, on average, are rehabilitated faster than nonveterans.

B. Mental Illness That Affects Culpability Should Be A Mitigating Factor In Sentencing, Even If It Was Not A Proximate Cause Of The Criminal Act

Mental illness is relevant to sentencing not just because prison environments tend to exacerbate mental problems, but also because sentencing judges traditionally had great discretion to take mental illness into account in assessing a defendant's culpability for his conduct. The Guidelines constrain that discretion by providing that mental illness can justify a downward departure under USSG § 5K2.13 only if the illness "contributed substantially to the commission of the offense." *Id.* Some, but not all, courts have construed this provision narrowly—to foreclose, for example, downward departures for individuals whose mental illnesses led them to the desperate straits from which they committed the crime, but did not directly cause the crime itself. *See, e.g., United States* v. *Carucci*, 33 F. Supp. 2d 302, 303 (S.D.N.Y. 1999) (rejecting downward departure under USSG § 5K2.13 because "a compulsive gambler is not, *a fortiori*, a compulsive illegal trader");[6] *cf. United States* v. *Sadolsky*, 234 F.3d 938, 943 (6th Cir. 2000) ("§ 5K2.13 does not require a direct casual link between the [significantly reduced mental capacity] and the crime charged").

To the extent the Guidelines narrow the circumstances in which mental illness may serve as a basis for sentencing leniency, they arbitrarily confine the traditional discretion of sentencing courts to take relevant mitigating factors into

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[6] This approach has contributed to the imprisonment of a disproportionately high number of individuals suffering from mental health problems. For example, the BJS has calculated that, "[a]t midyear 2005 . . . 45% of Federal prisoners" had at least one "mental health problem." *Mental Health Problems of Prison and Jail Inmates* at 1. That figure compares to "an estimated 11% of the U.S. population age 18 or older" who met a similarly broad measure of "mental health disorders." *Id.* at 3. When considering only the most seriously mentally ill—where estimates for the adult U.S. population typically run between 1 and 5 percent—the BJS has calculated that 7.4 percent of federal prisoners are mentally ill. *See Mental Health and Treatment of Inmates and Probationers* at 1-2.

account. Indeed, the Sentencing Commission's adoption of USSG § 5H1.3 "represented a major change in course in criminal law, as it devalued the importance of *mens rea*—an element that had been an important factor in sentencing for more than a century." *United States* v. *Shore*, 143 F. Supp. 2d 74, 78 (D. Mass. 2001). This arbitrary constraint on sentencing discretion is particularly unfair to veterans, and not just because veterans are disproportionately likely to suffer from mental illness in the first place. It is also unfair because a veteran's mental illness is often attributable to combat experiences sustained in the service of this country.

II. THE GUIDELINES ARBITRARILY EXCLUDE PARTICULARLY HONORABLE MILITARY SERVICE AS A DISCRETIONARY BASIS FOR IMPOSING A SENTENCE BELOW THE APPLICABLE GUIDELINES RANGE

Veterans have performed one of the highest—and, in the case of combat veterans, one of the most dangerous—acts of citizenship. As Congress and the courts have recognized, that service entitles veterans to special consideration in a variety of contexts.[7] The Sentencing Commission abandoned that traditional policy, and arbitrarily constrained the longstanding discretion of sentencing courts, by providing that "[m]ilitary . . . service," among other good works, is "not ordinarily relevant in determining whether a departure is warranted." USSG § 5H1.11. The Sentencing Commission offered no explanation for that unfortunate decision. *See* 56 Fed. Reg. 22762, 22779-80 (May 16, 1991).

Congress has provided that "the history and characteristics of the defendant" should inform what is the "just pun-

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[7] Congress has made clear the esteem in which it holds veterans in legislation addressing topics ranging from employment, 5 U.S.C. § 3309, to naturalization, 8 U.S.C. §§ 1439, 1440, to education, 38 U.S.C. §§ 3001 *et seq.*, to medical care, *id.* §§ 1701 *et seq.*, to housing and small business loans, *id.* §§ 3701 *et seq.* We are not aware of any context in which Congress has legislated that a veteran seeking favorable treatment may not at least argue that such grace is supported by his or her service record. The Sentencing Commission thus broke dubious new ground when it adopted USSG § 5H1.11 (discussed in the text).

ishment for the offense." 18 U.S.C. § 3553(a). As the Court explained in *Koon* v. *United States*, 518 U.S. 81 (1996), "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Id.* at 113; *see also id.* at 98 ("A district court's decision to depart from the Guidelines ... will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." (citing *Mistretta* v. *United States*, 488 U.S. 361, 367 (1989))).

Both before and after adoption of the Sentencing Guidelines, courts recognized that, at times, individuals who have served this country in the military, especially when they have done so in combat, deserve the benefit of the doubt at sentencing. For example, in the leading Guidelines-era case to address the relevance of military service as a ground for departure before the Sentencing Commission addressed the issue by adopting USSG § 5H1.11, the sentencing court explained that

> a person's military record is a relevant factor to be considered at sentencing, because it reflects the nature and extent of that person's performance of one of the highest duties of citizenship. An exemplary military record ... demonstrates that the person has displayed attributes of courage, loyalty, and personal sacrifice that others in society have not. Americans have historically held a veteran with a distinguished record of military service in high esteem. This is part of the American tradition of respect for the citizen-soldier, going back to the War of Independence....
>
> In ignoring a defendant's military service record, the Commission has done a disservice (albeit unintentional) to those ex-service men and women who have served their country faithfully in time of

> war or other need, and who later find themselves brought before a federal court on criminal charges.

Pipich, 688 F. Supp. at 193.

The *Pipich* court's consideration of the defendant's military record was consistent with the general rule of statutory interpretation that "interpretative doubt[s]" in veterans' benefits statutes should "be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (citation omitted).[8] Indeed, where veterans could benefit from a veterans' benefits statute, the "statute should not be read restrictively to bar [them] unless it is expressly commanded." *United States* v. *Convento*, 336 F.2d 954, 955 (D.C. Cir. 1964). And as courts have recognized in similar contexts, military veterans are entitled to full consideration of their individual service records before they are denied grace. *Yuen Jung* v. *Barber*, 184 F.2d 491, 497 (9th Cir. 1950) (military veteran seeking "matter of grace . . . should not be finally rejected without making sure that he has not shown himself worthy of what Congress intended the servicemen described in the Act to have").

Accordingly, before the Commission effectively overruled *Pipich* by adding USSG § 5H1.11, courts subjected defendants' military records to meaningful review and made departure decisions on the basis of a given veteran's specific contributions. For example, the *Pipich* court granted a downward departure to a defendant who had received dozens of medals for his service in Vietnam, 688 F. Supp. at 192-193, while the Eighth Circuit found a "military enlistment consisting of eleven years of duty within the continental United States, mainly as a recruiter" insufficient to support a downward departure, *United States* v. *Neil*, 903 F.2d 564, 566 (8th Cir. 1990). Returning to such a model now that the Guidelines are advisory would at least allow each veteran to

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[8] The Court has recognized that Congress understands this interpretive principle. *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991).

argue his or her own service record to a sentencing judge. That right would be important to petitioner Rita, for example, as his 24 years service in the Marine Corps included highly decorated combat service in both Vietnam and the Persian Gulf. 4th Cir. Appellant Br. 12. There is nothing reasonable about the Guidelines' suppression of such distinguished service as a basis for reducing a veteran's sentence below the Guidelines range.

In sum, an individual military veteran's service record, as well as any mental or physical injuries lingering from his service, are sentencing factors properly considered under Section 3553(a). They will not counsel below-Guidelines sentences for all veterans, but all veterans should be permitted to make their arguments to unconstrained judges.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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